OGC Has Reviewed

29 August 1947

MEMORANDUM FOR [redacted]
Acting Chief, Advisory Council

Subject: Protection of Communications Intelligence
[S.1019]

1. In the proposed version of the Bill for the protection of cryptograph systems and communications intelligence, it is provided that "whoever having obtained or having had custody of, access to, or knowledge of (1) any classified information * * * and who divulges it, etc. shall be punished." We feel that this makes the word "classified" a critical point in the proposed Bill. In defining the term "classified information", the Bill proposes construing the phrase to mean information segregated for purposes of National security and marked to designate such segregation.

2. We have tried to forsee the attitude of the Courts towards language of this type and believe that clear indication has been given by the Supreme Court in the case of Gorin v. United States, 312 U.S. 715, 61 S.Ct. 429, at 433. The Gorin case was a criminal prosecution under the Espionage Act, which uses the words "information respecting the national defense" and "information relating to the national defense." The defense attempted to obtain a narrow ruling of the statute which would specify that relating to the "national defense" meant just places and materials specified in the Act and contended that any extension of this meaning would make the Act un-Constitutional as violative of due process because of indefiniteness. The Court rejected this contention and ruled that it was the intent of Congress to place a broad restriction on the wording of the Act. The Court went on to rule as follows:

> "[W] In each of these sections of the Act the document or other thing protected is required also to be 'connected with' or 'relating to' the national defense. The sections are not simple prohibitions against obtaining or delivering to foreign powers information which a jury may consider relating to national defense. If this were the language, it would need to be tested by the inquiry as to whether it had double meaning or forced anyone, at his peril, to speculate as to whether certain actions violated the statute. This Court has

frequently held criminal laws deemed to violate these tests invalid. United States v. Cohen Grocery Company, urged as a precedent by petitioners, points out that the statute there under consideration forbade no specific act, that it really punished acts 'detrimental to the public interest when unjust and unreasonable' in a jury's view. In Lanzetta v. New Jersey the statute was equally vague. 'Any person not engaged in any lawful occupation, known to be a member of any gang * * *, who has been convicted at least three times of being a disorderly person or who has been convicted of any crime in this or in any other State, is declared to be a gangster * * *.' We there said that the statute 'condemns no act or omission'; that the vagueness is such as to violate due process.

"/3 - 57 But we find no uncertainty in this statute which deprives a person of the ability to predetermine whether a contemplated action is criminal under the provisions of this law. The obvious delimiting words in the statute are those requiring 'intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation.' This requires those prosecuted to have acted in bad faith. The sanctions apply only when scienter is established. Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government. Finally, we are of the view that the use of the words 'national defense' has given them, as here employed, a well understood connotation. They were used in the Defense Secrets Act of 1911. The traditional concept of war as a struggle between nations is not changed by the intensity of support given to the armed forces by civilians or the extension of the combat area. National defense, the Government maintains, 'is a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.' We agree that the words 'national defense' in the Espionage Act carry that meaning. Whether a document or report is covered by section 1 (b) or 2 (a) depends upon their relation to the national defense, as so defined, not upon their connection with places specified in section 1 (a). The language employed appears sufficiently definite to apprise the public of prohibited activities and is consonant with due process."

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3. You will note that the Court appears to make the essential element "scienter" or "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation." (Incidentally, the Court specifically points out that no distinction is made between friend or enemy.) This leads us to suggest that you reconsider the wording of your proposed Bill which now provides in effect that "whoever shall communicate, furnish, transmit, or allow to be communicated to a person not authorized" shall be punished, etc. Perhaps language similar to that in the Espionage Act concerning "intent or reason to believe" should be used. In any case, we believe that the use of "classified information" might invalidate the whole Bill on the reasoning used in the Gorin case, that since the classification was an administrative act it would force a person, at his peril, to speculate as to whether certain actions violated the statute.

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LRH:emj